IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.163 OF 1986

1. Baban Balu Shingole
   of Titoli, Taluka Igatpuri, Dist. Nashik

2. Sajan Balu Shingole of Titoli, Taluka Igatpuri,
   Dist. Nashik. .. Appellants

v/s.

1. Pandurang Hari Nawale, since deceased
   through his heirs.

   A. Namdeo Pandurang Nawale
   B. Machindra Pandurang Nawale
   C. Uttam Pandurang Nawale
   D. Dnyaneshwar Pandurang Nawale

   Nos.1A to 1D R/o. Borthembhe,
   Tal. Igatpuri, Dist. Nashik.

   E. Janabai Manohar Bhor
      R/o. Ghotewadi, Post. Ghote,
      Tal. Igarpuri, Dist. Nashik.

   F. Gunabai Pandurang Joshi,
      R/o. Ghoti, Tal.Igatpuri, Dist. Nashik.

   G. Sunanda Haribhau Adole,
      R/o.Ghoti, Tal. Igatpuri,
      Dist. Nashik

Amendment carried out as per Court's order

dated 26.4.2006 passed in C.A.31/06

2. Rathunath Hari Nawale
3. Eknath Hari Nawale. .. Respondents

All residents of Bortembhe,
Taluka Igatpuri, Dist. Nashik.

Mr. S.G. Karandikar for the appellants.
Mr. Prashant Patil for Respondent Nos.1A to 1G and 3.

CORAM : ABHAY S. OKA, J.
DATED : 29TH NOVEMBER, 2007

ORAL JUDGMENT

Heard the submissions of the learned advocates appearing for the parties.

2. The second appeal is preferred by the original plaintiffs. The case of the original plaintiffs is that they were badly in need of money and therefore, they approached the father of the respondents Hari Laxman Nawale. The case of the appellants is that the said Hari did not possess a money lending licence. As there was urgent need of money, the appellants/plaintiffs were forced to execute a document as per the desire of said Hari in respect of the suit land which admeasures about 4 acres and 22 gunthas as a consideration for receipt of loan of Rs.4900/- by the appellants from the said Hari. It is

alleged that they were not aware about the contents of the said document being illiterate. Only after a reply was received to the suit notice, they became aware that what has been got executed was an agreement for sale in respect of the suit land. The case made out by the appellants/plaintiffs is that the respondents did not accept the repayment of alleged amount of Rs.4900/- and declined to put them in possession. Therefore, the appellants filed a suit for declaration that the suit agreement dated 13th December, 1971 is not binding on the them and the respondents have no right to demand execution of conveyance on the basis of the said document. A prayer was also made for possession of the suit land and for mesne profits.

3. The respondents/defendants contested the suit by filing their written statement. The case made out by the respondents/defendants is that the real nature of the transaction between the parties was that the appellants executed an agreement for sale in favour of the deceased father of the respondents for consideration of Rs.6500/- and their deceased father paid an earnest money of Rs.4900/-. The balance amount of Rs.1600/- was to be paid at the time of execution of the sale deed. The case of the respondents is that their deceased father was put in possession of the suit land in part performance of the agreement for sale. Their case is that they have been ready and willing to perform their part of the

agreement. Plea of bar of limitation was also raised by the respondents/defendants.

4. The learned trial Judge dismissed the suit. The learned trial Judge held that the appellants/plaintiffs failed to establish that the real nature of transaction was a money lending transaction. An appeal was preferred by the appellants/plaintiffs. The said appeal has been dismissed by the appellate court. Being aggrieved by the judgment and decree of the Courts below, the present Second Appeal has been preferred by the appellants/plaintiffs.

5. Earlier, the second appeal was disposed of by order dated 28th August, 1998. This court passed an order of remand with a direction to the trial court to decide the issue whether the possession of the respondents became unauthorised and whether the appellants were entitled to get back the possession. When the said order was passed, it was not brought to the notice of the court that the first respondent in the appeal had expired. Therefore, by order dated 4th February, 2005, the order dated 28th August, 1998 was recalled and the second appeal was restored.

6. This appeal was finally heard on 7th and 8th April, 2005. This court framed the following three substantial questions of law:-

(i) Whether the Courts below failed to properly interpret the real nature of transaction reflected from the agreement dated 13th December 1971 (Exh.33)?

(ii) Whether the Courts below failed to properly appreciate the scope of section 53A of the Transfer of Property Act, 1882?

(iii) Whether the trial Court committed an error by not framing an issue regarding the readiness and willingness of the defendants to perform their part of the suit agreement?

7. After considering the said substantial questions of law, by the judgment and order dated 7th and 8th April, 2005, this court held that (i) Transaction dated 13th December, 1971 was not a money lending transaction and it was an agreement of sale; (ii) The prayer for possession made by the appellants was on the basis of the title and, therefore, the suit was governed by Article 65 of the Limitation Act. This court, therefore, held that the suit filed by the appellants is within limitation. (iii) The

respondents were put in possession under the suit agreement for sale dated 13th December, 1971 in part performance of the said agreement; (iv) The respondents were possibly entitled to protect their possession only under section 53A of the Transfer of Property Act, 1882 (hereinafter referred to as the "said Act of 1882"); and (v) A specific issue on the readiness and willingness on the part of the respondents to perform their part of the said agreement was not framed by the trial court and hence, prejudice has been caused to the parties.

8. After recording the aforesaid findings, this court framed the following issue:-

> "Whether the defendants prove that they have been ready and willing to perform their part of the agreement with a view to seek protection under section 53A of the Transfer of Property Act, 1882?"

9. By keeping the appeal pending, the said issue was remitted to the trial court with the direction to give opportunity to both the parties to lead evidence. The trial court was directed to record its finding on the said issue which was directed to be certified by the District Court after hearing the parties.

Accordingly, the parties appeared before the trial court and their evidence was recorded. The trial court answered the issue in the negative by holding that the respondents have failed to prove their readiness and willingness. After hearing the parties, the said finding has been affirmed by the appellate court. The respondents have filed their objections to the said finding in the form of cross-objections.

10. The judgment and order dated 7th and 8th April, 2005 rendered by this court has not been challenged by either parties. Therefore, now the only question to be decided is whether the respondents-defendants are entitled to claim protection under section 53A of the said Act of 1882. Therefore, it is necessary to scrutinise the findings of the trial court and appellate court on the issue of readiness and willingness. If the said finding is against the respondents, the decree for possession will follow.

11. The learned advocate for the appellants has taken me through the findings recorded by the courts below on the issue framed by this court. He has also invited my attention to the pleadings and evidence led by the parties. He submitted that the said findings will have to be accepted. The learned advocate for the respondents submitted that all along, the respondents

have showed readiness and willingness to pay the balance amount. He submitted that at no stage, the appellants have called upon the respondents to deposit the balance consideration and there was no order passed by any court directing the respondents to deposit the balance consideration. He submitted that the issue of readiness and willingness ought to have been decided in favour of the Respondents. He pointed out that the balance consideration was deposited by the respondents in the trial court on 22nd September, 2005. He invited my attention to the assertions made in the notice issued by the respondents on 4th August, 1975 expressing readiness and willingness to pay the balance consideration. He submitted that even in the written statement, similar assertions have been made by the respondents-defendants. Placing reliance on the decision of a Division Bench of this court in the case of Nilkanth Dhondiba Chavan, since deceased v. Umabai Anant Desai and others 2005(2) Bombay Cases Reporter, 220, he submitted that the findings recorded by the courts below are completely contrary to the law laid down by the decision of the Division Bench of this court. He invited my attention to what has been held by the Division Bench in paragraph 9 of the said judgment. He submitted that the only test would be whether a person was in a position to pay the money on direction by the court and not

whether he had the money. He stated that as the respondents have deposited the amount without waiting for the court to pass an order, the finding on the issue of readiness and willingness could not have been in favour of the appellants. He submitted that the findings of the appellate court being contrary to the evidence and pleadings are perverse and, therefore, those findings are required to be set aside by upholding the cross-objections filed by the respondents.

12. I have carefully considered the submissions. It will be necessary to refer to the orders passed by the courts below by which findings on additional issues have been recorded. The courts below and especially the trial court has referred to the evidence led by the parties after remand. It must be necessary here to note that the agreement dated 13th December, 1971 provides that the price was fixed at Rs.6500/- and a sum of Rs.4900/- was paid by way of earnest money. The sale deed was to be executed within one year. The courts below have held that the respondents had never shown readiness and willingness to pay the balance amount of Rs.1600/-. The courts below found that the case made out by the respondents after remand that, in the year 1974, the original defendant alongwith two other witnesses went to the house of the plaintiff and his mother with a sum of Rs.1600/-, was an afterthought and the

said case was not made out in the written statement. The trial court has considered the evidence of the other two witnesses examined by the respondents and has declined to accept their evidence. The courts below have held that the deposit of the amount on 22nd September, 2005 is of no consequence for deciding the issue of readiness and willingness. The appellate court has also considered the evidence in detail. Though there are concurrent findings recorded by courts below on this aspect, since the findings are recorded on the basis of the issue framed by this court, I have also examined the factual submissions made by the learned advocate for the respondents.

13. Reliance has been placed on the notice dated 21st September, 1975 sent by the defendants in their capacity as legal representatives of deceased Hari which is by way of reply to the notice dated 4th August, 1975 sent by the appellants. In paragraph 3 of the said reply, it is stated that when the father of the respondent Hari demanded execution of the conveyance against payment of Rs.1600/-, till the time of demise of Hari, the appellants avoided to execute the said sale deed. In paragraph 4, it is asserted that the respondents were ready and willing to pay a sum of Rs.1600/-. It must be stated here that there is no reference in the said notice that on a particular day or in a

particular month, Hari visited the house of the plaintiffs/appellants alongwith the witnesses and offered to pay Rs.1600/-. In the written statement filed by the respondents, it is stated that when deceased Hari demanded execution of the conveyance, the appellants avoided to execute the conveyance. There is an assertion made that the respondents were ready and willing to pay the balance amount. Again, in the written statement, there is no specific stand taken that on a particular date or in a particular month, Hari approached the plaintiff alongwith the witnesses for tendering the balance amount.

14. Before remand, the evidence of the first respondent was recorded. In the deposition, a vague statement has been made that father of the first respondent Hari demanded execution of the conveyance and the conveyance was not executed. In his evidence, the first respondent has not stated that Hari alongwith two witnesses offered the amount. It is pertinent to note that in paragraph 15 of the cross-examination, the first respondent stated that the respondents did not file a suit for specific performance as they were not having sufficient funds. In paragraph 16, he stated that Hari was possessing a sum of Rs.1600/-. In paragraph 17, the first respondent stated

that as the respondents had become owners of the suit land, the said Hari or the respondent did not tell the appellants to execute the sale deed. He further admitted that he was unable to tell exactly when he demanded the execution of the conveyance.

15. After remand by this court, the third respondent filed his affidavit in lieu of evidence. In the said affidavit, for the first time, he came out with a case that he alongwith deceased Hari and two witnesses Tulsiram Lahane and Narayan Gatir met the first and second plaintiffs and their mother and offered a sum of Rsd.1600/- to them. He stated that again in 1974, after demise of his father, he alongwith the same witnesses met the first and second plaintiffs and their mother and offered to pay a sum of Rs.1600/-. Even if omission in this behalf in the written statement ignored, what is more important is, such a plea was never raised by the witnesses who earlier stepped in the witness box on behalf of the respondents and that is the reason why the courts below have found that material improvements have been made by the respondents while leading evidence after this court directed the trial court to decide the issue. Apart from all this, in the cross-examination of the said two witnesses, there are contradictory statements made as regards to their visit to the first and second plaintiffs and their father.

16. Reliance has been placed by the respondents on the decision of this court in the case of Nilkanth Dhondiba Chavan (supra). It must be stated that during the course of dictation of the judgment, the learned advocate for the respondents fairly stated that the said decision cannot be relied upon in view of the subsequent decision of the Apex Court.

17. Thus, sum and substance of the discussion is that there is no scope to interfere in the findings recorded by the courts below on the issue of readiness and willingness and the findings recorded by the courts below on the said issue will have to be accepted. Hence, what follows is that the respondents cannot protect their possession under section 53A of the said Act, 1882 and therefore, the appellants who are the owners are entitled to a decree for possession.

18. Hence, the appeal succeeds and I pass the following order:-

ORDER

The impugned judgments and decrees are quashed

and set aside and the suit stands decreed in terms of prayer clause (c) of the plaint. There will be an enquiry held under Rule 12 of Order XX of the Code of Civil Procedure, 1908 for ascertainment of mense profits. The appellants are entitled to costs throughout from the respondents. The cross-objections stand dismissed.

On the prayer made by the advocate for the respondents, the decree for possession will remain stayed till 29th February, 2008.

ABHAY S. OKA, J.